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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Attorney General Opinion No. 12-IIB12
November 21, 2012

VIA EMAIL AND REGULAR MAIL

Ms. Margaret McKay
League of Women Voters of Delaware
2400 W. 17th Street
Clash Wing, Room 1, Lower Level
Wilmington, DE 19806
lwvde@voicenet.com

Re: FOIA Complaint Against Capital School District Board

Dear Ms. McKay:

We hereby respond to your second petition to the Attorney General, received on April 10, 2012 (the “**Second Petition**”), for a written determination regarding the Board of Education (the “**Board**”) for the Capital School District (the “**District**”) and, specifically, the Board’s compliance with certain “open meeting” requirements set forth in Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 (“**FOIA**”).¹ For the reasons discussed below, and based on our review of the documents provided to us, we conclude that the Second Petition lacks merit.

¹ The Board is a “public body” within the meaning of FOIA. *See* 29 *Del. C.* § 10002(h). As such, the Board is subject to the “open meeting” requirements of FOIA. *See* 29 *Del. C.* § 10004.

INTRODUCTION

The instant dispute relates to a prior FOIA petition filed against the Board in October 2011 (the “**First Petition**”). The First Petition challenged the validity of actions taken by the Board at a public meeting held on August 24, 2011 (the “**August 2011 Meeting**”), including the Board’s vote to approve a proposed five percent (5%) salary increase for District administrators (the “**Salary Proposal**”). In our written determination of that matter, *Att’y Gen. Op.* 12-IIB01 (Jan. 6, 2012) (the “**January Opinion**”), we concluded that the Board violated FOIA in several respects and determined that the Board’s vote to approve the Salary Proposal was invalid. *See id.*

After we issued the January Opinion, the Board took a number of measures to address our concerns and, on February 8, 2012 (the “**February 8th Meeting**”), voted for a second time to approve the Salary Proposal. The Second Petition challenges that vote and asserts that the Board again violated FOIA’s open meeting provisions. As discussed herein, we do not believe that the Board violated FOIA as alleged in the Second Petition.

BACKGROUND

The October 2011 Petition And The January Opinion

In October 2011, this Office received the First Petition, in which you alleged that the Board violated FOIA’s open meeting provisions in connection with the August 2011 Meeting. The First Petition asserted that the Board’s vote on the Salary Proposal was invalid because the Board, among other things, failed to give the public advance notice of the anticipated vote. We agreed. *See Att’y Gen. Op.* 12-IIB01 (Jan. 6, 2012).

As reflected in the January Opinion, we determined that the vote was improper and asked the Board to advise us whether the Board would seek to recoup funds improperly paid under the

Salary Proposal, or whether the Board would reconsider and again vote upon the Salary Proposal at a properly noticed and otherwise lawfully convened public hearing. *See id.* As noted below, the Board opted for the latter option.

The January 2012 Meeting

On January 18, 2012, the Board held a public meeting (the “**January 18th Meeting**”) to discuss, among other things, issues related to the Salary Proposal and the January Opinion. According to the minutes of the January 18th Meeting, the Board, in open session, unanimously agreed to and did adopt a resolution dealing with the Salary Proposal and the January Opinion. That resolution, Resolution No. 12-070 (the “**Resolution**”), reflects the Board’s official decision to reconsider the Salary Proposal and directed that the Salary Proposal be placed on the February 2012 meeting agenda for “discussion/action.” No issues have been raised with respect to the Resolution or any other action taken at the January 18th Meeting.

The February 2012 Agenda And Meeting

On February 1, 2012, the Board timely filed, among other things, a public announcement (the “**Announcement**”) and an agenda in respect of the February 8th Meeting (the “**February 8th Agenda**”).² Both the Announcement and the February 8th Agenda state:

The [Board] will convene for its regular monthly meeting on Wednesday, February 8, 2012 The [B]oard will convene into open session at 6:30 p.m. in the auditorium and entertain a motion to move into Executive Session for the purpose of discussing Student Disciplinary Matter, Personnel Matters and Litigation The Board will reconvene into public session . . . at approximately 7:30 p.m.

² Though not required by FOIA, the Board, in addition to the February 8th Agenda, filed a separate agenda for the executive session the Board intended to and ultimately did convene at the February 8th Meeting.

Section 3 of the February 8th Agenda lists a number of pending matters under the heading “Action/Discussion/Information.” One of those matters, Agenda Item 3.04, includes express references to the Salary Proposal and the Resolution. The abbreviations “A” and “D” appear directly opposite Agenda Item 3.04. The February 8th Agenda defines those abbreviations to mean “Action” and “Discussion,” respectively.

Consistent with the Announcement and the February 8th Agenda, the Board opened the meeting and entered public session at 6:30 p.m. According to the minutes of the February 8th Meeting (the “**February 8th Minutes**”), the Board then entertained and unanimously approved a motion to move into executive session. The Board entered closed session at 6:31 p.m. At 7:10 p.m., the Board adjourned the executive session and reconvened in open session. According to the Board, the Salary Proposal was not discussed in executive session.

Though not reflected in the February 8th Minutes, the Board permitted two representatives of the Association of Administrators to make a twenty-minute presentation in support of the Salary Proposal (the “**Presentation**”). Several members of the public apparently took issue with the Presentation and briefly interrupted the speakers. Thereafter, the Board entertained public comment with respect to the Salary Proposal. It appears that at least six members of the public attended the February 8th Meeting and spoke out against the Salary Proposal. The Board ultimately approved the Salary Proposal by a vote of 3 to 2.

The April 2012 Petition³

On April 10, 2012, we received the Second Petition, which challenges the validity of the Board's second vote to approve the Salary Proposal. The Second Petition deals exclusively with the conduct of the February 8th Meeting and asserts a number of alleged FOIA violations. Specifically, the Second Petition asserts that the February 8th Agenda:

- failed to adequately reflect the planned discussion of and vote on the Salary Proposal;
- failed to provide the public with advance notice of the Presentation, which severely hampered attendees' ability to oppose the Salary Proposal; and
- did not include a statement of the Board's intention to discuss the Salary Proposal in executive session.

The Second Petition also asserts that the Board improperly went directly into closed session without first opening the February 8th Meeting up to the public. Finally, the Second Petition asserts that the Board violated FOIA by failing to record the salary Presentation in the February 8th Minutes.

DISCUSSION

We believe the above-referenced arguments lack merit. The Board gave appropriate notice of the February 8th Meeting by means of the Announcement and the February 8th Agenda. The February 8th Agenda complied fully with FOIA's open meeting requirements and gave members of the public enough information to decide whether to attend the February 8th Meeting. FOIA ensures that members of the public have the opportunity to observe and monitor the Board's decisions. FOIA does not give citizens the right to make or rebut presentations or

³ On November 8, 2012, we received a third FOIA petition against the Board, which petition concerns the conduct of the Board meeting held on May 16, 2012. That petition is not addressed herein and will be the subject of a separate written determination.

otherwise participate actively in public meetings. For these and other reasons discussed below, we do not believe that the Board violated FOIA as asserted in the Second Petition.

**A. FOIA Policy And Disclosure Requirements,
Generally**

FOIA is predicated upon the “vital” policy of this State that the business of government be performed in an “open and public manner” so that citizens can “*observe* the performance of public officials” and “*monitor* the decisions that are made by such officials in formulating and executing public policy.” 29 Del. C. § 10001 (emphasis added). It follows that, the more Delaware citizens know about our governmental processes, the better able we are to evaluate the performance of our public officials and hold them accountable on election day. *See id.* FOIA was adopted to serve these goals and must be construed accordingly.⁴ *See id.*

FOIA contains a number of open meeting provisions mandating, among other things, that all meetings held by the Board and other public bodies be open to the public, unless a FOIA exemption applies. *See* 29 Del. C. §§ 10004(a), 10004(b). FOIA requires our public bodies to give “public notice of their regular meetings and of their intent to hold executive sessions closed to the public, at least 7 days in advance thereof.” *See* 29 Del. C. § 10004(e)(2); *see also* 29 Del. C. § 10002(a) (defining the term “agenda”). FOIA requires that any such “notice” include an agenda notifying the public of important matters that will be discussed and possibly voted on so that members of the public can decide whether to attend a particular public meeting. *See* 29 Del. C. § 10002(a); *Att’y Gen. Op.* 12-IIB09 (July 13, 2012).

⁴ We note that FOIA is not without its limits. FOIA expressly recognizes a number of important policy-based exemptions that permit a public body to convene in private under certain circumstances. *See* 29 Del. C. § 10004(b). Those exemptions are not implicated in the present dispute.

B. Issues Related To The February 8th Agenda

The Second Petition asserts that the Board violated FOIA because the February 8th Agenda: (1) did not provide notice of the Board's plan to discuss and vote on the Salary Proposal at the February 8th Meeting; (2) failed to inform the public about the Presentation and therefore hampered the ability of concerned citizens to oppose the Salary Proposal; and (3) failed to reflect the Board's plan to discuss the Salary Proposal in executive session. These arguments are deficient factually and legally.

*1. Notice of Anticipated Action With Respect
the Salary Proposal*

We believe the February 8th Agenda adequately reflects the Board's plan to discuss and vote on the Salary Proposal.

FOIA requires that each public meeting agenda include a "general statement of the *major issues* expected to be discussed at a public meeting." 29 Del. C. § 10002(a) (emphasis added). We agree that the Salary Proposal was a "*major issue*" requiring advance notice in the form of a "*general statement*." The question before us is whether the February 8th Agenda contains a general statement sufficient to alert the public that the Board would discuss and vote on the Salary Proposal at the February 8th Meeting. *See Att'y Gen. Op.* 98-IB08 (Sept. 1, 1998) ("FOIA requires that the notice be reasonably calculated to provide adequate notice of the issues to be considered by the public body."). We believe that it does.

As noted, Section 3 of the February 8th Agenda contains a list of topics scheduled for "Action/Discussion/Information" at the February 8th Meeting. That list includes, at Agenda Item 3.04, an express reference to the Salary Proposal, as well as the prior Resolution. Further, the February 8th Agenda indicates that the Salary Proposal would be the subject of "discussion."

The February 8th Agenda also indicates that Agenda Item 3.04 was slated for “action.” We believe the term “action,” when used in this context, was reasonably calculated to provide the public with notice of the planned vote on the Salary Proposal, as evidenced by the fact that at least six members of the public attended the February 8th Meeting and expressed their views with respect to the Salary Proposal.

The February 8th Agenda was reasonably calculated to, and in fact did, alert the public that the Board would discuss and vote on the Salary Proposal.

*2. Notice of Presentation in Support of the
Salary Proposal*

The Second Petition next asserts that the Board improperly failed to reflect the Presentation on the February 8th Agenda. The Second Petition further asserts that the Presentation should have been disclosed in advance of the February 8th Meeting to enable concerned citizens to prepare counter-arguments against the Salary Proposal. We disagree and believe these arguments misconstrue the principal goals of and rights bestowed in FOIA’s open meeting provisions.

FOIA contains a number of open meeting provisions that recognize and promote our citizens’ rights to *observe* and *monitor* the performance of our public officials. *See* 29 Del. C. §§ 10001, 10004. None of the open meeting requirements, or any other provision of FOIA, on its face, necessarily required the Board to provide advance notice of the Presentation. Though the Board had a statutory duty to provide a general statement of the major issues expected to be discussed at the February 8th Meeting, *see* 29 Del. C. §§ 10002(a), 10004(e)(2), we do not believe that such duty applied to the Presentation.

The Presentation, in and of itself, was not a “major issue” requiring disclosure under FOIA’s open meeting requirements. The Presentation was not up for vote, but rather, was part of a broader discussion about the pros and cons of the Salary Proposal. In our view, the Salary Proposal was the relevant “major issue,” not the Presentation. *See Att’y Gen. Op.* 08-IB09 (May 27, 2008) (“Any member of the public who was concerned about the partitioning of the . . . property was on notice that it would be discussed and voted on at the . . . meeting. The ‘major topic’ was the reconsideration of the partition application, not waiver, which was simply the procedural means by which the [public body] disposed of the application.”). Nor do we believe that the Board was obligated to reference the Presentation as part of the general statement required for the Salary Proposal. For the same reasons previously discussed, the February 8th Agenda provided adequate notice to the public that the Board intended to discuss and vote on the Salary Proposal at the February 8th Meeting. Nothing more was required.

We note that these arguments, which we reject, appear to reflect confusion about the aims of and rights conferred in FOIA’s open meeting provisions. FOIA contains a declaration of policy that expresses, in very clear terms, the ends FOIA was intended to serve -- namely, to enable citizens to “*observe*” and “*monitor*” the performance of our public officials. 29 *Del. C.* § 10001 (emphasis added). Based on that unambiguous declaration, Delaware courts and this Office have consistently rejected arguments that FOIA provides citizens with implied rights to voice concerns or otherwise participate actively in public meetings. *See Reeder v. Del. Dep’t of Ins.*, C.A. No. 1553-N, 2006 WL 510067, *12 (Del. Ch. Feb. 24, 2006), *aff’d*, 931 A.2d 1007 (Del. 2006) (“There is nothing in the text of the declaration of policy or in the open meeting provision requiring public comment or guaranteeing the public the right to participate[.]”); *Att’y Gen. Op.* 08-IB08 (May 23, 2008) (“Your theory that members of the public were somehow

unable to speak to the issue they came prepared to address . . . does not implicate any right created by FOIA.”). We believe this reasoning applies with equal force here.

The Board was not required by FOIA to provide advance notice of the Presentation.

*3. Notice of the Board's Intent to Discuss the
Salary Proposal in Executive Session*

The last argument with respect to the February 8th Agenda is that it fails to include a statement of the Board's intent to convene in executive session to discuss the Salary Proposal. This argument has no factual basis. We see no evidence that the Board, in fact, discussed the Salary Proposal during the executive session held during the February 8th Meeting. We have not been provided with documents or any other support for this argument. In contrast, the Board, through council, has unequivocally denied that it discussed the Salary Proposal at the February 8, 2012 executive session. We see no reason to question that representation.

**C. February 8th Meeting: Failure To “Book-
End” The Executive Session**

The Second Petition asserts that the Board improperly went directly into closed session without first opening the February 8th Meeting up to the public. We interpret this “failure to book-end” argument as an alleged violation of FOIA § 10004(c), which requires that a motion to go into executive session be made and approved in open session. *See 29 Del. C. § 10004(c)* (“The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public . . .”). We see no violation of FOIA § 10004(c).

The documents you provided to us show that the Board followed the proper procedures for entering executive session. Specifically, the February 8th Minutes reflect that the Board:

- opened the meeting and entered public session at 6:30 p.m.;

- entertained and unanimously approved a motion to move into executive session; and
- entered closed session at 6:31 p.m.

Based on the February 8th Minutes, which we assume reflect accurately the events at the February 8th Meeting, we conclude that the Board entered executive session in compliance with FOIA § 10004(c).

D. February 8th Minutes: Failure To Record The Salary Presentation in the February 8th Minutes

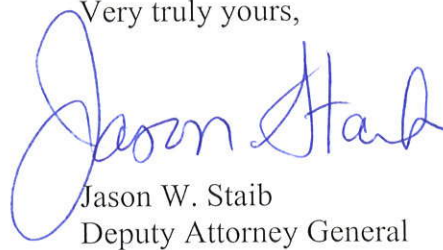
Your final argument, based on the omission of the Presentation from the February 8th Minutes, is very similar to an argument raised in the First Petition -- namely, that the Board violated FOIA § 10004(f) by failing to record in the minutes of the August 2011 Meeting the details of the Board's discussion about the Salary Proposal. We rejected that argument in the January Opinion because "FOIA only requires the minutes to include[] a record of those members present and a record, by individual member[,] . . . of each vote taken and action agreed upon." *Att'y Gen. Op.* 12-IIB01 (Jan. 6, 2012) (citing FOIA § 10004(f)). The minutes of the August 2011 Meeting satisfied those minimal requirements, as do the February 8th Minutes.

While we agree the Board probably should have included a reference to the Presentation in the February 8th Minutes, FOIA did not obligate the Board to do so. *Att'y Gen. Op.* 05-IB04 (Feb. 11, 2005) (observing that FOIA "neither says that the subject's discussion must be summarized [in the minutes] nor attempts to define how specific such summary should be"). The February 8th Minutes are legally sufficient.

CONCLUSION

For the reasons discussed above, we reject the arguments concerning the February 8th Agenda, the February 8th Meeting and the February 8th Minutes and conclude that the Second Petition lacks merit.

Very truly yours,



Jason W. Staib
Deputy Attorney General

Approved:



Ian R. McConnel
State Solicitor

cc: David H. Williams, Esquire (via email)